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No. 88-744

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

MARK TURNER, IV,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S BRIEF IN REPLY TO GOVERNMENT'S OPPOSITION

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QUESTION PRESENTED

I.

Is it consistent with the principles of fairness and due process of law under the Fifth Amendment to allow Petitioner to suffer a conviction for a crime he did not commit because an appeals court chose not to consider the application of Rule 52 of the Federal Rules of Criminal Procedure.

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OPINIONS BELOW

The opinions below were presented in Petitioner's Petition and are adopted and incorporated herein by reference.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 and 2101.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved has previously been stated in Petitioner's opening brief and is adopted and incorporated herein by reference.

STATEMENT

Petitioner adopts and incorporates, by reference, the statement previously filed in his Petition. Certain factual matters in the prosecution's brief, however, need to be clarified.

The prosecution's Brief, incorrectly indicates at 2 and 5 that Mark Turner "knew Steve Haag's whereabouts" at the time of the July police raid on his home.

He did not say that. He lied about seeing Haag because he was frightened.[1] C. A. App. 122-123. Haag had threatened his Mother and family. Mark's fears were justified. Haag was considered armed and dangerous. C.A. App. 128. He had been charged with planning, from inside his jail cell, to have one of his enemies killed.

Mark Turner was not involved with Haag when Haag was dealing drugs.

OPINION OF THE LOWER COURT

The decision of the lower Court as set forth in the Petition filed in this cause is adopted and incorporated here by reference.

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[1] Mark Turner's post arrest statement was used to bolster the aiding and abetting prosecution. He was acquitted of that charge.

ARGUMENT

A. The Prosecution Is Correct - The Court Of Appeals Below Did Ignore The Sufficiency Of The Evidence.

As the prosecution's Brief recognized, courts of appeal are required to consider "egregious errors" even when not raised at trial.[2] Insufficiency of the evidence is an "egregious error".

The exculpatory no, as the prosecution recognizes at pages 4-6 of its brief, is a sufficiency issue. If the doctrine applies, there was no crime. Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962); United States v. Cogdell, 844 F.2d 179 (4th Cir. 1988);

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[2] The prosecution's citation at page 3 of its Brief to United States v. Young, 470 U.S. 1, 15 (1985) is not apropos. Young concerned a prosecutor's response to a defense counsel's misconduct which, although inappropriate, was not "plain error", not an "egregious error."

United States v. Equihua-Juarez, 851 F.2d 1222 (9th Cir. 1988).

B. The Prosecution's Analysis Of The Merits Is Inappropriate.

The prosecution wrongly claims that the lower court correctly refused to consider the sufficiency of the evidence because the exculpatory no does not apply. The prosecution's analysis is faulty.[3]

The prosecution seeks to redefine and narrow the doctrine. They focus on two of the five criteria, namely, number 3, whether or not an agency function has been impaired, and number 5, whether or not the statement was incriminatory. The

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[3] During oral argument, the Fourth Circuit panel appeared to agree with Appellant that application of the doctrine meant that no crime had occurred. Judge Chapman commented that the facts of this case were appropriate for application of the doctrine.

prosecution misses the mark on both points.[4]

The agency function was not "impaired". When Mark Turner falsely said that he had not seen Haag since January, that did not impair the agency's function. United States v. Bedore, 455 F.2d 1100 (9th Cir. 1972), (exculpatory no applied where agents misled as to identity of person on whom they wished to serve process) The Bedore court found that 18 U.S.C. 1001 was not intended to apply under such circumstances; the agency functions were not impaired. Id. at 1111.

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[4] If the lower court had complied with the requirements of Rule 52(b) of the Federal Rules of Criminal Procedure and considered the question of sufficiency of the evidence the prosecution could have appealed to this Court for a exposition on the parameters of the doctrine. There was no ruling. The parameters of the dcctrine should not be subject to challenge in this case at this time.

Similarly, in United States v. Bush, 503 F.2d 813 (5th Cir. 1974), agents investigating Mr. Carona, interviewed Mr. Bush. Bush gave false affidavits regarding the Carona investigation but the agency function was not impaired. The exculpatory no applied. This is similar to Mark Turner who was told that he could be prosecuted if he had helped Haag. He was prosecuted for having helped Haag. The aiding and abetting charge was premised upon Mark Turner not turning in Haag when Haag was supposed to have begun serving his sentence.

More recently in Equihua-Juarez, supra, the exculpatory no was applied when an alien lied to an official at the border. The false statement did not impair the basic functions entrusted to the border patrol since a competent investigator will not rely on such

statements when acting in an "investigatory" capacity.

The key distinction in all of the exculpatory no cases is the criminal investigative, as distinct from the administrative, nature of the activity. Cogdell, supra, at 184. See also United States v. Medina de Perez, 799 F.2d 540, 545 (9th Cir. 1986). A trained agent in a criminal investigation is not overly surprised when he receives a false statement. As the court recognized in Cogdell, supra and Medina de Perez, supra, a good agent will continue vigorous investigation of all leads until personally satisfied he has obtained the truth. Cogdell at 184; Medina de Perez at 546.

The exculpatory no applies to the statement in the case sub judice. A truthful answer would have been

incriminatory. The prosecution claims that it was "unlikely" that Mark Turner would be prosecuted for harboring a fugitive, if he had admitted to having seen Haag. This is not the measure of whether a statement is incriminatory.

A statement is incriminatory if it can lead or there is reasonable cause to believe it might lead to a link in a chain of incriminating evidence. Hoffman v. United States, 341 U.S. 479, 486-487 (1951). See also Kastigar v. United States, 406 U.S. 441, 445 (1972). The statement in this case was incriminatory. It was used to bolster the prosecution's unsuccessful effort to convict Mark Turner for having aided and abetted Haag after the fact.

The exculpatory no applies. There was no crime. The Appeals Court should not have ignored Rule 52(b), Federal Rules of

Criminal Procedure. It should have considered the sufficiency of the evidence.

CONCLUSION

This Court should not condone the lower court's refusal to consider a conviction when there was no crime.

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